

BEFORE THE
PHYSICAL THERAPY BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:	Case No. 1D 2003 63484
JOHN L. FOX,	OAH No. L2004090495
Respondent.	

PROPOSED DECISION

On May 18, 2005, Administrative Law Judge Timothy S. Thomas, Office of Administrative Hearings, heard this matter in Riverside, California.

E. A. Jones, III, Deputy Attorney General, represented complainant Steven K. Hartzell, Executive Officer of the Physical Therapy Board (hereinafter the board).

John L. Fox (hereinafter respondent) appeared in propria persona.

The matter was submitted on May 18, 2005.

FACTUAL FINDINGS

1. Complainant Steven K. Hartzell filed the First Amended Accusation in his official capacity as Executive Officer of the board.
2. The board issued Physical Therapist license number PT 26110 to respondent on April 11, 2001. The license is current and will expire on June 30, 2006, unless renewed.
3. In San Bernardino County Superior Court case number FMB006022, on August 12, 2003, respondent was convicted by his plea of nolo contendere of violating Penal Code section 602.5, subdivision (a), which makes it a misdemeanor to enter a dwelling without the permission of the owner or person in lawful possession of the dwelling. The conviction arose out of a dispute that respondent had with his ex-wife, Lynette, from whom respondent had been separated for approximately one month as of Sunday, June 15, 2003. On that date, respondent, who had weekend custody of the two children of the 10-year marriage, returned the children to their mother's home at 58330 Navajo Trails, Yucca Valley, in a timely fashion. An argument ensued between respondent and his ex-wife, and respondent left the premises, inadvertently leaving his cellular telephone behind. Respondent returned to the house to retrieve the phone; but in a taunting fashion, Lynette held up the phone in

a window, but refused to give it to respondent. Respondent left again, but returned the next day, June 16, 2003, when he knew Lynette would be at work. His children were home with a babysitter, who had been instructed by Lynette not to allow respondent in the house. When respondent arrived, his son opened the door and let his father in the house before the babysitter was able to stop him. Respondent searched the house for his cell phone and when he could not find it, he called his ex-wife at her place of employment. When she would not tell respondent where his phone was, respondent indicated that he was going to take a lock box located in the master bedroom and keep it until she returned his phone. While respondent retrieved the box Lynette told the babysitter to call 911. Respondent left the home with the lock box, which contained cash, wedding rings, birth certificates and the like. He was arrested later that day at his place of employment and eventually charged with burglary, extortion and grand theft, all felonies, as well as the misdemeanor charge to which he eventually pled. Respondent spent five days in jail before his arraignment.

4. Respondent was sentenced by a judge of the San Bernardino Superior Court, Joshua Tree District, at the time of his plea on August 12, 2003. Respondent was placed on probation for three years on certain terms and conditions, including: 1) That he pay \$110 to the victim restitution fund; 2) That he serve 30 days in jail, with credit for time served and the remainder to be served on consecutive weekends; 3) That he attend and complete a 16-week anger management program by January 14, 2004; 4) That he stay 100 yards away from Lynette Fox; and 5) That he perform 250 hours of community service. Respondent paid the fine, successfully completed the anger management program, performed the required community service, and served the remaining jail time by way of a work furlough program. All felony charges were dismissed as part of the plea agreement.

5. In case number MMB009470, on April 7, 2004, respondent pleaded nolo contendere to disobeying a court order. On January 9, 2004, respondent's son had called him and said that he wanted to go home. (Two days earlier, by stipulated agreement in the divorce proceedings, respondent had been given primary custody of the boy.) Respondent called the police and asked if an officer could meet him one block away from Lynette's house. Respondent showed the responding deputy a copy of the stipulation and order regarding custody of his son, and the deputy contacted Lynette and arranged for the boy to leave with his father. For reasons not entirely clear from the evidence,¹ a report was filed by Lynette and/or another deputy that alleged a violation of the term of respondent's probation that required him to stay 100 yards away from his ex-wife. Respondent was continued on probation, a 180-day jail sentence was suspended, and he was ordered to pay another \$110 to the victim restitution fund. According to respondent's testimony, the sentencing judge commended respondent for calling the police as a means of handling his son's

¹ In a letter to the board dated September 1, 2004, respondent indicated that he waited 100 *feet* from Lynette's home and guesses that Lynette saw him and called the police. A second deputy arrived and apparently filed a report to the effect that respondent had violated the stay-away order.

request, but emphasized that to avoid future problems he should simply stay away from Lynette's residence except at pre-established times for the delivery or pick-up of his children.

6. Respondent's physical therapy license expired on June 30, 2004. He testified that he had not notified the board of a change of address when he and his ex-wife separated and Lynette was not cooperative in forwarding his mail. Therefore, the board's routine notice/reminder of his license expiration did not reach respondent, and he did not independently remember to renew in a timely fashion. Sometime between late July and August 17, 2004, the expired status of his license was brought to respondent's attention by a staff member at work. Respondent initially told board investigators that he discovered the problem in late July, but at the hearing he testified that he must have found out on or about August 17, 2004, the date that he wrote a check to the board for renewal of the license. His memory is that he called the board immediately upon realizing his mistake, and was merely told to send in a check for \$120 and a Statement of Renewal form. The evidence did not establish whether respondent was able to refresh his memory by reference to the renewal form or his cancelled check at the time of the interview when he said he learned of the license expiration in late July. Based upon his telephone conversation with a board representative when he learned of the expired status of his license and his understanding of the Statement of Renewal form, respondent believed that he was permitted to continue to practice physical therapy while awaiting receipt of his renewed license.

7. The Statement of Renewal was signed by respondent on September 1, 2004, and respondent represented on the form that he mailed payment for renewal on August 17, 2004. The form sets forth in full the first paragraph of Business and Professions Code section 121, as follows:

No licensee who has complied with the provisions of this code relating to the renewal of his or her license prior to expiration of such license shall be deemed to be engaged illegally in the practice of his or her business or profession during any period between such renewal and receipt of evidence of such renewal which may occur due to delay not the fault of the applicant.

(Italics in original.) The form further indicated that the board considered a license to be renewed as of the postmark date of the payment.

8. Respondent notified the board of his change of address simultaneously with his payment of \$120 on August 17, 2004. His address had actually changed in January 2004. Respondent testified that he did not realize at the time of his move that he had a legal responsibility to notify the board of the change.

9. On September 3, 2004, the Medical Board of California (MBC), which processes the renewal of licenses and licensing fees for physical therapists and other health-related professions,² notified respondent that it had received his payment of \$120, but because the payment was more than 30 days late, an additional charge of \$60.00 was “required to update your license to 06/30/04.” No statement was made in the letter from MBC to the effect that respondent should not practice physical therapy pending receipt of the renewed license. Respondent paid the \$60 penalty, and on September 20, 2004, his license was renewed.

10. Between June 30, 2004, and September 20, 2004, respondent practiced physical therapy and provided direct patient care while he held an expired license.

11. During the course of its investigation of respondent’s criminal convictions, the board became aware of the expired status of respondent’s license. Investigator Paul Johnson subpoenaed records from Hi-Desert Medical Center in Joshua Tree (Hi-Desert), where respondent was employed as Director of Rehabilitation Services and as a physical therapist. Mr. Johnson and physical therapist Arlette Godges randomly reviewed patient records at Hi-Desert and found that respondent had delivered physical therapy services directly to patients on July 12-14, July 19, July 20, July 26-27, July 29 and August 6, 2004. The services were delivered in contemplation of compensation and with the knowledge that Hi-Desert would bill its patients and/or their insurance companies for the services.

12. Arletta Godges testified as an expert on behalf of complainant. She opined that the criminal convictions are related to respondent’s fitness to practice physical therapy because, by virtue of his licensure, respondent was “entrusted to work within the rules, regulations and laws” pertaining to physical therapy. She testified that if respondent cannot be trusted to follow the rules in his private life, “it makes one wonder” if he can do so in his professional life. The witness said that she could not, however, relate respondent’s lack of judgment to his clinical skills. On the subject of respondent’s practicing on an expired license, Ms. Godges testified that to allow the lapse of the license was “a grave oversight.” The witness interviewed respondent during a meeting in February of 2005, when respondent admitted that he practiced on his expired license, which Ms. Godges characterized as unprofessional conduct. Respondent told Ms. Godges that he discovered near the end of July that his license had expired, so that the witness was particularly critical of respondent’s decision to continue to practice after the discovery until September 20, 2004. Finally, the expert testified that the practice “could be construed as fraud” to continue to bill for services during the time of expired licensure.

The testimony of Ms. Godges was not particularly helpful or persuasive. In significant part, the opinions of the expert were couched in ambiguous terms. To say that “it makes one wonder” whether respondent can follow the rules in

² See Business and Professions Code sections 2420 and 2684.

his professional life, or that billing for work done during the period respondent's license was expired "could be construed as fraud," does not provide a sound basis for fact-finding. Moreover, Ms. Godges tended to advocate excessively and appeared antagonistic toward respondent personally.

13. Respondent, now nearly 35 years of age, is a five-year U.S. Navy veteran who received a good conduct medal and an honorable discharge. He has no criminal record other than the convictions related above and no history of discipline by the board. Respondent graduated from the physical therapy program at Loma Linda University in 2000 near the top of his class and made the Dean's List. Respondent is a member of the American Physical Therapy Association and has served on two different committees of that organization. There is no evidence of any complaints by patients or doctors concerning his work. The Vice President of Patient Services for Hi-Desert Medical Center testified that respondent has no record of discipline at his place of employment and that he provides good quality care. In addition to his direct patient care duties, respondent has served as the Director of Rehabilitation Services at Hi-Desert since October of 2002. He recently resigned that position, and accepted a reduction in benefits, in order to spend more time with his children and at church.

14. Respondent admitted during his testimony that, with respect to entering his ex-wife's home without her permission, "[W]hat I did was wrong." But he argued that his domestic problems are not relevant to his duties as a physical therapist and should not form the basis for discipline of his professional license. He also testified that he now understands that it is his obligation to advise the board of changes of address, to maintain a current and valid license and that it is not the board's obligation to remind him to renew his license.

15. The board reasonably incurred costs in this matter for investigation in the sum of \$1,740.00, and for prosecution in the sum of \$7,455.50.

LEGAL CONCLUSIONS

1. The board may suspend, revoke or impose probationary conditions on a physical therapist's license for unprofessional conduct that is evidenced by the conviction of a crime which substantially relates to the qualifications, functions or duties of a physical therapist. The record of conviction or a certified copy thereof shall be conclusive evidence of that conviction. (Bus. & Prof. Code, § 2660, subd. (d).)

2. In seeking to discipline respondent's license, complainant has the burden to prove, by clear and convincing evidence, that all of the elements of the statutory grounds for discipline have been satisfied. (See *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853.)

3. Here, the essential facts are not in dispute. Respondent does not deny the fact of his convictions, nor does he deny the conduct that underlies the convictions. But he does dispute that the convictions are substantially related to the qualifications, functions or duties of his profession. The requirement of a nexus between the conviction involved and respondent's fitness to practice his profession is not only a statutory requirement in the discipline of physical therapists, but is a constitutional requirement imposed to satisfy due process and equal protection considerations implicated by depriving a respondent of the opportunity to practice his chosen profession. (See *Morrison v. State Board of Education* (1969) 1 Cal.3d 214.)

To assist in determining whether the conviction of any given crime is substantially related to the practice of physical therapy, the board promulgated a regulation that provides a conviction is so related "if to a substantial degree [the conviction] evidences present or potential unfitness of a person to perform the functions authorized by the license in a manner consistent with the public health, safety or welfare. Such crimes or acts shall include but not be limited to the following: (a) Violating or attempting to violate, directly or indirectly, or assisting or abetting the violation of, or conspiring to violate any provision or term of the Physical Therapy Practice Act. (b) Conviction of a crime involving fiscal dishonesty arising out of or in connection with the practice of physical therapy. (c) Violating or attempting to violate any provision or term of the Medical Practice Act." (Calif. Code of Regs., tit. 16, § 1399.20.)

Although the regulation does not limit the crimes that may have a nexus to the practice of physical therapy to the types listed, it is nevertheless significant that respondent's crimes do not fall into the categories that the board determined were most obviously and directly related to the practice of physical therapy. Moreover, crimes that arise from domestic disputes of the nature involved in this matter cannot be easily generalized to predict how a respondent would act in more typical social and business relations. Respondent committed no act of violence and no individual was ever in harm's way because of his conduct. Even in the heat of domestic turmoil, charges and counter-charges and custody issues, respondent had the presence of mind and good sense to call the police before approaching Lynette's house at a time not contemplated by existing court orders. That he may have approached more closely than 100 yards does not detract from the good judgment thus exercised. Respondent, who is nearly 35 years of age, has no other convictions on his record, and complainant offered no evidence of any other acts committed by respondent that would lead one to conclude he is a threat to the public and/or is not fit to continue to practice physical therapy.

As the paramount purpose of the operative statutes is to protect the public and as the evidence does not support a determination that respondent is a risk to members of the consuming public, the discipline of respondent's license based upon these convictions would seem to serve no purpose other than to mete out further punishment, which it is presumed, the penal law has adequately attended to. (*Brewer*

v. Department of Motor Vehicles (1979) 93 Cal.App.3d 358, 366.) In fact, respondent has been punished rather severely for conduct leading to relatively minor misdemeanor convictions.

As to the First and Second Causes for Discipline, therefore, based on Findings 3, 5, 11 and 12, cause has not been established to discipline respondent's license pursuant to Business and Professions Code section 2660, subdivision (d), or Business and Professions Code section 490, in that complainant did not establish by clear and convincing evidence that the convictions suffered by respondent are substantially related to the qualifications, functions or duties of the licensed profession.

4. The Third Cause for Discipline alleges a failure by respondent to notify the board of a change of address within 30 days of the change, a fact that was established by the evidence and admitted by respondent. However, the statute relied upon in the Accusation as authority to impose discipline for the transgression, Business and Professions Code section 2660, subdivision (i), does not authorize the board to discipline the license for that particular offense. The subdivision sets forth as a cause for discipline the violation of "any provision or term of *this chapter or the Medical Practices Act*." (Emphasis added.) "This chapter" refers to Chapter 5.7 of Division 2 of the Business and Professions Code, which regulates physical therapists. No section within chapter 5.7, or for that matter the Medical Practices Act,³ is found that requires that a licensee inform the board of a change of address. That requirement is found in California Code of Regulations, title 16, section 1398.6, subdivision (a). But the regulation does not provide for any sanction for a tardy address change notification, and Chapter 5.7 contains no provision to the effect that a violation of a regulation constitutes grounds for discipline. Therefore, cause is not established to discipline respondent's license under the Third Cause for Discipline.

5. The Fourth Cause for Discipline charges respondent with practicing without a valid and unexpired license in violation of Business and Professions Code section 2630. By virtue of Findings 6, 10 and 11, this charge was established by clear and convincing evidence.

6. The Fifth Cause for Discipline alleges that respondent is subject to discipline pursuant to Business and Professions Code section 2660, subdivision (l), in that he engaged in fraudulent, corrupt or dishonest acts that were substantially related to the qualifications, functions or duties of a physical therapist. The acts that are alleged to be fraudulent, corrupt or dishonest are the same facts alleged to support the Fourth Cause for Discipline; that is, complainant characterizes respondent's decision to practice physical therapy for compensation during the time his license was in an expired status as knowing and intentional.

³ Business and Professions Code section 2000 et seq.

Respondent credibly testified that he did not intentionally allow his license to expire, and that he was not aware of the mistake until approximately the time of his tardy renewal attempt, on or about August 17, 2004. Complainant did not establish by clear and convincing evidence that, between August 17 and September 20, 2004, respondent's state of mind was other than as he testified; that is, based upon his conversation with a board representative on or about August 17, and based upon his erroneous reading of the Statement of Renewal form, respondent believed he was permitted to practice physical therapy pending the processing of his renewal application. However naïve or incorrect he may have been, by virtue of Finding 6, respondent established that he held the good faith belief that he was permitted to practice physical therapy during the relevant time and to characterize his conduct as fraudulent, corrupt or dishonest exaggerates respondent's subjective state of mind and violates the rule of statutory construction requiring that the words used in a statute be given their usual or ordinary meaning. (*People v. Edwards* (1991) 54 Cal.3d 787, 833.) Having concluded that respondent held a good faith belief he was permitted to practice while his application for renewal was pending, his conduct cannot be said to be "fraudulent, corrupt or dishonest" as those terms are commonly used.

7. By clear and convincing evidence, therefore, complainant has established that respondent violated Business and Professions Code section 2630, in that respondent practiced physical therapy while his license was in an expired status. Under all of the circumstances of this case, and in consideration of the factors in mitigation found to exist by virtue of Findings 6, 7, 9, 13 and 14, the most appropriate disciplinary action is for the board to publicly reprove respondent pursuant to Business and Professions Code section 495. The board's disciplinary guidelines suggest this approach in consideration of the following factors: (1) The offense is an isolated incident; (2) Sufficient time has elapsed since the offense without further violations that would indicate a recurrence is unlikely; (3) The respondent has admitted to the offense; (4) The respondent has indicated remorse; (5) There has not been prior discipline for a similar violation; (6) Respondent has been active in a substance abuse program, where the offense is related to substance abuse. Of the relevant factors, respondent qualifies for a public reproof in consideration of factors 1, 3, 4 and 5. Insufficient time has elapsed to determine with any certainty whether respondent will re-offend, but given the domestic circumstances that led to respondent's lack of actual notice of the deadline and in light of the administrative proceedings that have clearly secured his attention, it may be predicted with considerable assurance that respondent will not again overlook the timely renewal of his license.

8. In any order issued in resolution of a disciplinary proceeding before the board, the board may request the administrative law judge to direct any licensee found guilty of unprofessional conduct to pay the board a sum not to exceed the actual and reasonable costs of the investigation and prosecution of the case. (Bus. & Prof. Code, § 2661.5, subd. (a).) Total costs in this matter are \$9,195.50. As complainant prevailed on but one of five causes for discipline (indeed, the Fourth Cause for

Discipline was added by amendment to the Accusation less than one month before hearing) and as the more serious charges were not sustained, a reasonable allocation of the costs attributable to the Fourth Cause for Discipline is \$1,000.00.

ORDER

1. The board shall issue a letter of public reproof to respondent for practicing while his license was expired.
2. Respondent shall pay the sum of \$1,000.00 to the board to reimburse the costs of investigation and prosecution of the matter.

DATED: June 10, 2005

Original Signed By:
TIMOTHY S. THOMAS
Administrative Law Judge
Office of Administrative Hearings